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IN THE

Supreme Court of the United States

October Term, 1962

No. 52

THE NEW YORK TIMES COMPANY,
A Corporation,
Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1962

No. 687

THE NEW YORK TIMES COMPANY,
A Corporation,

Petitioner,

v.

FRANK W. PARKS and JOHN PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

The respondents' brief in opposition argues that the Supreme Court of Alabama, in affirming the judgment against the resident defendants in the *Sullivan* case, held that the evidence sufficed to make a case against those defendants under the law of Alabama and that the trial court's charge as to liability based on ratification by silence was correct. We submit that the opinion of the Alabama Supreme Court refutes this contention and that the argument is inconsistent with the position taken by counsel for respondents in opposing the petition for a writ of certiorari in *Abernathy* v. *Sullivan*, No. 609, this Term.

I

As to the sufficiency of the evidence, the *Sullivan* opinion reads as follows (144 So. 2d at 46):

> "There being no judgments on the motion for a new trial of the individual appellants, and they having

> become discontinued, those assignments by the individual appellants attempting to raise questions as to the weight of the evidence, and the excessiveness of the damages are ineffective and present nothing for review. Such matters can be presented only by a motion for a new trial."

The brief in opposition in *Abernathy* v. *Sullivan*, No. 609, this Term, in enumerating matters which the respondent argued "are not" in that case (p. 7) includes the following (p. 11):

> "When petitioners allowed their motions for new trial to lapse, they were foreclosed from raising questions regarding alleged excessiveness of the verdict, or alleged insufficiency of the evidence."

The meaning of this submission by the respondent in *Sullivan* is elucidated by the further contention (pp. 13-14) that "the only question which petitioners might argue on this record is whether it is 'entirely devoid of evidence of any authorization, consent or publication' by petitioners," in the sense of *Thompson* v. *City of Louisville*, 362 U. S. 199 and *Garner* v. *Louisiana*, 368 U. S. 157. That is, of course, an issue which is narrower by far than that of whether the petitioners, on all the evidence, were entitled to dismissal of the action or to the direction of a verdict.

The respondents are entirely right in stating that the propriety of the trial court's denial of the affirmative charge requested by the individual defendants was properly before the Supreme Court of Alabama in *Sullivan*, notwithstanding its determination that the motion for new trial had become discontinued. *Foster* v. *Shepherd*, 269 Ala. 94, 110 So. 2d 894; *McMillan* v. *Aiken*, 205 Ala. 35, 40, 88 So. 2d 135. It is difficult to think that even this was actually passed on by the Court, since the opinion is silent on the issue and thus gives no indication of a possible basis for concluding that the trial court was correct. Assuming, however, that the matter was determined, the issue posed by the requested charge under the Alabama practice is confined to whether

there is a scintilla of evidence supporting liability under any of the plaintiff's theories of the case. See *Southern Apartments, Inc.* v. *Emmett*, 209 Ala. 584, 587-588, 114 So. 2d 453. The plaintiff in *Sullivan* argued that the Randolph letter to *The Times* concerning the original draft of the proposed advertisement (S. Tr. 1706; as to which see our petition, p. 7) and the silence of the defendants, viewed as an admission, constituted evidence that the defendants authorized the use of their names. The Alabama Supreme Court may have regarded this as a scintilla, while withholding judgment as to whether the verdict ought to have been set aside on all the evidence and as to whether the alternative theory of liability based on imputed ratification was valid. Such a determination plainly would not bind the District Court in its appraisal of the evidence on the removal and motion to remand; nor would it declare anything about the Alabama law that has a bearing on this case.

II

As to the charge of the trial court in *Sullivan* on the issue of ratification, the opinion of the Alabama Supreme Court says only the following (144 So. 2d at 45):

> "In their assignment of error No. 41, the individual appellants assert that the lower court erred in its oral instructions as to ratification of the use of their names in the publication of the advertisement. The instructions of the court in this regard ran for a half a page or better. The record shows that an exception was attempted in the following language:
>
> "'Lawyer Gray: Your Honor, we except to the court's charge dealing with ratification as well as the court's charge in connection with the advertisement being libelous per se in behalf of each of the individual defendants.'
>
> "The above attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review."

The Court's general endorsement of the charge as "a fair, accurate and clear expression of the governing legal principles," relied on by respondents in this case (Brief in Opposition, pp. 6-7, 14), when read in context, plainly refers only to the charge on libel, of which *The Times* complained, not to the charge on ratification, which alone is relevant to this petition.

III

What has been said makes clear, we think, that there is, at the least, a major question as to how far, if at all, the Supreme Court of Alabama in the *Sullivan* case declared *sub silentio* the law of Alabama on the respondents' case against the resident defendants. Since certiorari has been granted to review the judgment in *Sullivan*, that question will inevitably be examined by this court in determining the issues open for review on the petition of the individual defendants. *Abernathy, et al.* v. *Sullivan*, No. 609, this Term. It is appropriate, therefore, in our submission, that the issue be examined here as well or that the Court hold this petition pending its decision after argument of No. 609.

IV

The respondents urge as an objection to review their challenge to the timeliness of the removal, though the point was ruled against them by the District Court and was not passed on by the court below.

Assuming that it would be open to respondents to advance this ground in support of the judgment ordering remand (*Langres* v. *Green*, 282 U. S. 531, 535), we submit that the possible presence of that question in the case is, if anything, a further reason for review. For whether the time limit on removal prescribed by 28 U. S. C. § 1446(b), as amended in 1949, lays down a universal mandate, as respondents argue, is an important question of Federal practice which has not been determined by this Court.

That the respondents misconceive the situation in contending that the time limitation was "patently violated" is entirely clear. The statute does not in terms apply to cases such as this, where there is no "amended pleading, motion, order or other paper" received by the defendant "from which it may first be ascertained that the case is one which is or has become removable." Recognizing that there was no legislative purpose to eliminate removals the propriety of which does not appear upon the papers, the courts which have passed upon the issue have not deemed the 1949 revision to alter the prior law (see *e.g. Ayres* v. *Watson*, 113 U. S. 594, 597; *Powers* v. *C&O Ry. Co.*, 169 U. S. 92) that the time limitation is not jurisdictional. That view has heretofore been taken by the court below (*Weeks* v. *Fidelity & Casualty Co.*, 218 F. 2d 503), without dissent, so far as we are aware, in any other Circuit. See *e.g. McCleod* v. *Cities Service Gas Company*, 233 F. 2d 242 (10th Cir.). We think it is correct.

Respectfully submitted,

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